IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

HARRISON FRANKLIN,

Plaintiff,

OPINION AND ORDER

v.

11-cv-736-wmc

GREGORY GRAMS, DYLAN RADTKE, BRIAN FRANSON, LT. DAVIDSON, LT. KARNA, MARY FOSTER, ANTHONY ASHWORTH, CO II DOBRYZNSKI, CO BECK, SGT. HARRIS, CO II PULVER, MS. THORPE, DR. SCHELLER, LORI ALSUM, BARBARA DELAP, RYAN TOBIASZ, DR. SULIENE, MARC CLEMENTS, JOHN DOES 1-25, and JANE DOES 1-25

Defendants.

State inmate Harrison Franklin filed a proposed civil action pursuant to 42 U.S.C. § 1983, alleging an assortment of constitutional violations by multiple defendants. On August 12, 2012, the court directed Franklin to address certain ambiguities in his initial pleading by providing additional information about the defendants and his claims. After considering this supplemental information, the court concluded that his complaint violated Federal Rules of Civil Procedure 18 and 20 by joining unrelated claims against different defendants. At that time, the court identified four distinct lawsuits and instructed Franklin to select one to pursue under this case number. (Dkt. #22.)

Franklin timely responded to that order and submitted an amended version of his complaint pursuing one of the lawsuits identified in the court's prior order.[1] He now claims that defendants have violated his rights under the Eighth Amendment of the United States Constitution in various ways in response to his refusal to take his diabetes medication and talk with staff about his diabetes management. (Dkt. #24.) He is also eligible to proceed on this claim *in forma pauperis* and has paid an initial partial filing fee as required by the Prison Litigation Reform Act ("PLRA"), 28 U.S.C. § 1915(b).

Because Franklin is a prisoner, the court is still required by the PLRA to screen his amended complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915A. In addressing any *pro se* litigant's complaint, the court must read the allegations generously, reviewing them under "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 521 (1972). For the reasons that follow, the court will grant Franklin leave to proceed on his claims Eighth Amendment deliberate indifference claims based on allegations that he was denied medical treatment after refusing to follow his diabetes management protocol. In all other respects, Franklin is denied leave and those claims are dismissed.[2]

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[1] In addition to the amended complaint in this case, Franklin has filed one of the other identified lawsuits as a separate civil action. *See Franklin v. Radtke*, 13-cv-452-wmc.

[2] In addition to Franklin's filing of an amended complaint, Franklin also filed a motion for temporary restraining order. (Dkt. #29.) Because the basis for that motion is not

ALLEGATIONS OF FACTS[3]

A. Parties

At all times pertinent to the complaint, Franklin was confined at the Columbia Correctional Institution ("CCI"), where all of the defendants are employed as correctional officers, supervisory officials or health care providers. Those defendants include: Warden Gregory Grams; Dentist Dr. Scheller; Ms. Thorpe; Assistant Warden Marc Clements; Health Services Unit Manager Lori Alsum; Barbara DeLap; Unit Manager Brian Franson; Officer Beck; Sergeant Harris; Sergeant Mary Foster; Psychological Services Dr. Ryan Tobiasz; Lieutenant Karna; Dr. Suliene; Lieutenant Davidson; Security Supervisor and Unit Manager Anthony Ashworth; Administrative Captain Dylon Radtke; Officer Dobrzynski; Officer Pulver; and John and Jane Doe.

B. Conduct Reports and Other Discipline

In early 2008, Franklin was placed in disciplinary segregation as part of a "multi-disciplinary approach" instituted by Warden Grams and Assistant Warden Clement in an attempt to address Franklin's repeated refusal to manage his Type 1 diabetes, including

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related to the claims for which the court has granted Franklin leave to proceed, the court will deny the motion for temporary restraining order.

[3] In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). In his complaint, Franklin alleges, and the court assumes for purposes of this screening order only, the following facts.

checking his insulin levels and taking insulin shots.[4] Plaintiff also received conduct reports as a result of this refusal.

Specifically, plaintiff alleges that Sergeant Harris and Correctional Officer Beck issued Conduct Report #1834145 for Franklin's refusal to take insulin or speak to staff about his refusal. Unit Manager Franson also supported the view that Franklin had an obligation to stand at his cell door and speak to Beck about his medical situation or face discipline for disobeying an order.

On a separate occasion, Radtke and Franson issued Conduct Report #1515452 based on Franklin's refusal to speak to treatment staff. Franklin received 180 days of disciplinary separation as a result of that report. Defendants Dobrzynski and Ashworth were also involved in that conduct report and disciplinary hearing.

Finally, Franklin also received Conduct Report #2035590 from defendants Foster and Karna, which also involved Ashworth, for his refusal to check his insulin levels. As a result of that conduct report, Franklin received a 21-day extension of his "temporary lock-up" status.[5]

In May 2009, Franklin further alleges that he was punished by Lieutenant Davidson for refusing unwanted and unsolicited medical treatment and was "physically

[4] Diabetes mellitus is an endocrine disorder characterized by an abnormally high glucose (sugar) level in the blood. *See* AMER. MEDICAL ASS'N, COMPLETE MEDICAL ENCYCLOPEDIA 454 (2003). Type 1 diabetes arises when there is little or no insulin produced by the pancreas. *See id*. As a result, people with type 1 diabetes require frequent monitoring of blood glucose levels and daily insulin injections to live. *See id.* 454, 455.

[5] Franklin alleges that he received Conduct Report #1513172 as a result of his refusal to speak to staff, but does not allege which defendants were involved.

attacked and restrained by numerous unknown C/O's." (Am. Compl. (dkt. #24) p.16.) Plaintiff also alleges that he was placed on various restrictions (*i.e.*, no sharps, back of cell, 2-man escort, leg restraints, bag meal, and lower trap) as a result of this incident.

Plaintiff further alleges that Warden Grams and Assistant Warden Clement were aware of these conduct reports and told plaintiff that they were issued because of his refusing specific aspects of his recommended diabetes treatment.

C. Denial of Medical Treatment

Dr. Suliene allegedly refused to treat Franklin's deviated septum, even after he complained of an inability to breath. Dr. Suliene also allegedly postponed the approved surgery for this condition until Franklin stabilized his blood sugars. Even after his blood sugars were stabilized, Dr. Suliene "pretend[ed] that no surgery was ever ordered." (Am. Compl. (dkt. #24) p.4.) Lastly, Dr. Suliene allegedly took away Franklin's extra pillow to aid in his breathing.

Franklin also alleges that he was denied access to a dentist because of his refusal to comply with prescribed diabetes medical treatment. Franklin alleges that the acting dentist at that time, as well as Grams, Thorpe, Clements, Scheller, Alsum, and DeLap, took part in this decision. As a result, Franklin alleges that he did not see a dentist until after he was released from segregation, at which time his periodontal disease had worsened.

Franklin further alleges that he has bipolar and anxiety disorders and that Ryan Tobiasz denied Franklin psychological treatment based on his unwillingness to take

diabetic medication or participate with diabetic treatment for an extended period of time. Specifically, Franklin alleges that Tobiasz removed his "red-tag / do not double" status, which qualified Franklin for a single room without a cellmate, as a result of Franklin's refusal to participate in diabetic treatment.

Franklin also alleges that he was denied insulin and other prescribed treatment at various times as a form of punishment. Specifically, Franklin alleges that defendant Harris refused a request for insulin when Franklin's blood sugar level was above 500 and denied his special athletic style shoes while on temporary lock-up status in 2011.

Finally, Franklin alleges that defendants refused to treat his foot pain associated with diabetic neuropathy during this same time period, even after a podiatrist ordered him shoes and other forms of treatment.

D. Conditions of Confinement

Franklin alleges that in January 2011, Sergeant Mary Foster denied Franklin a shower based on his refusal to check his insulin level. Lieutenant Karna also stated that Foster could deny him a shower every time he refused to take his medication, and threatened Franklin with temporary lock-up status.[6]

While in temporary lock-up for one of the incidents described above, Franklin alleges that his cotton blankets were also taken from him as a form of punishment and replaced with a wool blanket, for which he has a known allergy.

[6] As a result of this event, Franklin allegedly received Conduct Report #2035590 discussed above.

E. Relief Sought

Franklin seeks injunctive relief from the multi-disciplinary approach that was imposed by Warden Grams and Assistant Warden Clement as a form of punishment for Franklin's repeated refusal to comply with the prescribed medical treatment for his diabetes. He also seeks $2,025,000.00 in compensatory damages and $100,000.00 in punitive damages from each defendant, "jointly and severally."

OPINION

In its prior screening order, the court styled lawsuit #1 -- the lawsuit Franklin has now opted to pursue under this case number -- as one for "retaliation," but that word can have an unintended meaning in the legal context. A plaintiff can assert a *claim for retaliation* only if a defendant takes certain actions because of the plaintiff's protected conduct or activity. *See Bridges v. Gilbert*, 557 F.3d 541, 555-56 (7th Cir. 2009) (describing elements of a retaliation claim based on protected conduct). Here, Franklin's refusal to comply with diabetes treatment does not constitute protected conduct, and therefore Franklin cannot state a claim for retaliation under the Fourteenth Amendment. *See Owens v. Hinsley*, 635 F.3d 950, 954 (7th Cir. 2011) ("[A]n inmate does not have a constitutionally protected right to refuse life-saving medical treatment."); *Freeman v. Berge*, 441 F.3d 543, 546 (7th Cir. 2006) (explaining that only "[f]ree people who are sane have a liberty interest in refusing life-saving medical treatment") (citing *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 278-79 (1990)).

As such, the court's use of "retaliation" here simply suggests a common basis for defendants' actions, not the allegation of an independent claim. Accordingly, the court must determine whether defendants' action (or inaction) violated plaintiff's constitutional rights, not whether plaintiff's rights were violated because of protected conduct. As described above, the court understands plaintiff's claims to fall into three possible categories: (1) imposition of punishment in violation of his due process rights; (2) deliberate indifference to serious medical needs based on denial of medical treatment in violation of his Eighth Amendment rights; and (3) a failure to provide humane conditions of confinement, otherwise known as a conditions of confinement claim also under the Eighth Amendment.

In addition to considering whether plaintiff has stated a constitutional violation, the court must consider which of the panoply of defendants are implicated in plaintiffs' viable claims, if any. To demonstrate personal liability under § 1983 in particular, a plaintiff must allege sufficient facts showing that an individual personally caused or participated in the alleged constitutional deprivation. *See Zimmerman v. Tribble*, 226 F.3d 568, 574 (7th Cir. 2000); *Walker v. Taylorville Correctional Ctr.*, 129 F.3d 410, 413 (7th Cir. 1997) (noting that "personal involvement" is required to support a claim under § 1983).

I. Punishment As A Due Process Violation

First, plaintiff complains of conduct reports that were allegedly issued as punishment for Franklin's refusal to follow prescribed medical treatment and/or discuss his treatment with correctional officers. Franklin may disagree, but an inmate does not have a constitutionally protected right to disobey legitimate orders or commit disciplinary infractions while in prison. *See Lewis v. Downey*, 581 F.3d 467, 476 (7th Cir. 2009) (citing *Soto v. Dickey*, 744 F.2d 1260, 1267 (7th Cir. 1984)). Franklin affirmatively alleges that each of the three conduct reports were issued either because he refused to engage in diabetes management, including checking his insulin level, or refused to speak with the correctional officer defendants about his diabetes management. Under these circumstances, Franklin's own pleading demonstrates that his disobedience was the motivating factor behind the reports and subsequent discipline.

In one sentence, Franklin alleges that in May 2009, he was attacked by unidentified correctional officers. While this allegation may form the basis of an excessive force claim, plaintiff neither identifies the specific individuals involved in the alleged attack, nor provides sufficient details for the court to determine whether the defendants acted "maliciously and sadistically . . . to cause harm" and whether Franklin suffered more than *de minimis* harm. *Hudson v. McMillian*, 503 U.S. 1, 9-10 (1992) (describing standard for Eighth Amendment excessive force claim).

Even if these correctional officers are the "Doe" defendants plaintiff includes in his caption, the court cannot grant plaintiff to proceed with such a vague claim. If

plaintiff learns through discovery the identify of these correctional officers, *and* if he can allege in good faith sufficient facts to state an excessive force claim, plaintiff may seek leave to add such a claim provided that he moves quickly.

II. Deliberate Indifference in Violation of the Eighth Amendment

The Eighth Amendment affords prisoners a constitutional right to medical care. *Snipes v. DeTella*, 95 F.3d 586, 590 (7th Cir. 1996) (citing *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)). To allege a claim for deliberate indifference, plaintiff must plead that: (1) he had an objectively serious medical need; and (2) defendants were deliberately indifferent to it. *Grieveson v. Anderson*, 538 F.3d 763, 779 (7th Cir. 2008).

"A medical need is considered sufficiently serious if the inmate's condition has been diagnosed by a physician as mandating treatment or is so obvious that even a lay person would perceive the need for a doctor's attention." *Gomez v. Randle*, 680 F.3d 859, 865 (7th Cir. 2012) (quoting *Roe v. Elyea*, 631 F.3d 843, 857 (7th Cir. 2011)). Franklin's complaint alleges denial of medical treatment for a variety of ailments, including (1) diabetes and diabetes-related conditions, e.g., diabetic neuropathy; (2) periodontal disease; (3) deviated septum; and (4) mental health issues, including bi-polar disorder and anxiety. All of the medical conditions of which Franklin complains can constitute serious medical conditions for purposes of an Eighth Amendment analysis. *See Egebergh v. Nicholson*, 272 F.3d 925, 928 (7th Cir. 2001) (diabetes); *Board v. Farnham*, 394 F.3d 469, 480 n.4 (7th Cir. 2005) (periodontal disease); *Smith v. Asghar*, No. 03-3605,

114 Fed.Appx. 222, 224, 2004 WL 2496686, at *2 (7th Cir. Oct. 21, 2004) (deviated septum); *Sanville v. McCaughtry*, 266 F.3d 724, 734 (7th Cir. 2001) (mental illness).

"Deliberate indifference" means that defendants must have been aware that plaintiff was at a substantial risk of serious harm but failed to take reasonable measures to abate it. *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). Plaintiff alleges that various defendants denied him medical treatments and medication, including insulin, either directly by refusing to follow prescribed diabetes management protocol, or indirectly by placing him in segregation and temporary lock-up status, which limited access to certain medical treatments. Specifically, plaintiff alleges the Dr. Suliene denied him treatment for deviated septum, including by postponing and ultimately cancelling his surgery, and by denying him a second pillow to aid in his breath. Plaintiff also alleges that defendants Grams, Thorpe, Clements, Dr. Scheller, Alsum and DeLap were each involved in the decision to deny him access to dental care, including ignoring an order from the Wisconsin DOC's Secretary's office requiring treatment. Plaintiff further complains that correctional officer Harris denied him insulin on one occasion. The court will allow plaintiff to proceed on these claims.

Franklin also alleges that Tobiasz acted with deliberate indifference to his psychiatric needs by removing him from "red flag / double" status -- in other words, taking away his status as a single occupant. However, this allegation fails to raise a reasonable inference that Tobiasz was deliberately indifferent to Franklin's psychiatric condition. Accordingly, the court will deny Franklin to proceed as to this claim.

Lastly, Franklin complains of the denial of appropriate shoes and other treatments prescribed by a podiatrist. Franklin does not direct these allegations against a specific defendant, but rather alleges generally that "CCI refused" these treatments. As explained above, Franklin must allege sufficient facts showing that an individual personally caused or participated in the alleged constitutional deprivation. *See Zimmerman*, 226 F.3d at 574. Accordingly, the court cannot grant Franklin leave to proceed on this specific claim at this stage, but will grant him leave to amend his complaint if he can, in good faith, name specific individuals who acted with deliberate indifference to his diabetic neuropathy in denying him appropriate shoes and other treatments.

While Franklin's allegations against certain defendants satisfy the court's lower standards for screening, he will ultimately need to come forward with admissible evidence permitting a reasonable trier of fact to conclude that defendants actually acted with deliberate indifference to his serious medical need. This is a much higher standard than that applied at the initial screening stage. Specifically, going forward, it will be Franklin's burden to *prove* that his conditions constituted serious medical needs. Additionally, he must also prove that each defendant he identifies (1) knew his condition was serious and required treatment or caused serious pain and suffering, and (2) deliberately ignored his need for treatment. Both of these things might very well require Franklin to provide credible expert testimony from a physician.

Also, specific to at least some of his claims, it appears Franklin *himself* was responsible for the alleged lack of medical care, which may preclude a claim of deliberate

indifference. *See Pinkston v. Madry*, 440 F.3d 879, 892 (7th Cir. 2006) (affirming judgment in favor of medical personnel on a claim of deliberate indifference where inmate was the sole cause of delay in treatment); *Walker v. Peters*, 233 F.3d 494, 500 (7th Cir. 2000) (holding that prison doctor who withheld HIV medication did not act with deliberate indifference where inmate refused to take HIV test).

III. Conditions of Confinement Eighth Amendment Claim

Finally, Franklin alleges that he was denied a shower on one occasion, denied a cotton blanket for some unidentified period of time, and threatened with continued denials. The Eighth Amendment's prohibition against cruel and unusual punishment imposes upon prison officials the duty to provide prisoners "humane conditions of confinement." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). To constitute cruel and unusual punishment, conditions of confinement must be extreme. General "lack of due care" by prison officials will never rise to the level of an Eighth Amendment violation because "it is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause." *Whitley v. Albers*, 475 U.S. 312, 319 (1986).

To demonstrate that prison conditions violated the Eighth Amendment, a plaintiff must allege facts that satisfy a test involving both an objective and subjective component. *Lunsford v. Bennett*, 17 F.3d 1574, 1579 (7th Cir. 1994). The objective analysis focuses on whether prison conditions were sufficiently serious so that "a prison official's act or

omission results in the denial of the minimal civilized measure of life's necessities," *Farmer*, 511 U.S. at 834, or "exceeded contemporary bounds of decency of a mature, civilized society," *Lunsford*, 17 F.3d at 1579. Even taking into account Franklin's alleged allergy to wool, the court finds that these allegations do not satisfy the objective component absent the additional allegation that the conditions were maintained for a substantial period of time, amounting to weeks if not months. *See Williams v. Pollard*, No. 09-cv-485-wmc, 2010 WL 4063198, at *4 (W.D. Wis. Oct. 8, 2010) (explaining that conditions of confinement claims typically involve prolonged or constant deprivations). Accordingly, the court will deny plaintiff leave to proceed on these claims.

ORDER

IT IS ORDERED that:

1) Plaintiff Harrison Franklin's request for leave to proceed on deliberate indifference Eighth Amendment claims against defendants Dr. Suliene, Dentist Dr. Scheller, Ms. Thorpe, Health Services Unit Manager Lori Alsum, Barbara DeLap, Warden Gregory Grams, Assistant Warden Marc Clements, and Sergeant Harris is GRANTED. Franklin's request for leave to proceed on those claims with respect to all other defendants and with respect to all other claims against any of the defendants is DENIED.

2) Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendant. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for the defendant.

3) For the time being, plaintiff must send the defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing the defendants, he should serve the lawyer directly rather than the defendants. The court will disregard any documents submitted by plaintiff

unless plaintiff shows on the court's copy that he has sent a copy to the defendant or to defendant's attorney.

4) Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.

5) Plaintiff is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at his institution of that institution's obligation to deduct payments until the filing fee has been paid in full.

6) Plaintiff's motion for temporary restraining order (dkt. #29) is DENIED.

Entered this 1st day of August, 2014.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge